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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEY RAYMOND CABRAL,

Defendant and Appellant.

H033926

(Santa Clara County

Super. Ct. No. CC124746)

In 2002, a jury convicted defendant Joey Raymond Cabral of assault with a deadly weapon and related offenses. The trial court sentenced him to three years in prison. In March 2006, Atascadero State Hospital (ASH) admitted him while on parole for treatment until August 7, 2007, pursuant to the MDO Act (Pen. Code, § 2960 et seq.-- mandatory treatment for prisoner with severe mental disorder (MDO) as condition of parole).<sup>1</sup> On May 7, 2007, ASH notified the district attorney that defendant's mental disorder was not in remission and asked for defendant's continued involuntary treatment for one year pursuant to section 2970. On May 21, the district attorney filed a petition. Following a court trial on August 15, the trial court extended defendant's commitment for one year until August 7, 2008. On February 14, 2008, ASH notified the district attorney that defendant's mental disorder was not in remission and asked for defendant's continued involuntary treatment for one year pursuant to section 2970. On April 18, the

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<sup>1</sup> Further unspecified statutory references are to the Penal Code.

district attorney filed a petition. On April 25 and May 23 at trial setting conferences, defendant waived time and moved for and obtained continuances. On June 27, July 18, and July 25 at trial setting conferences, defendant moved for and obtained continuances. On August 8, the trial court set trial for August 28. Defendant then moved to dismiss the petition on the ground that ASH's notification to the district attorney was untimely. The trial court denied the motion and, following a court trial, extended defendant's commitment for one year until August 7, 2009. On appeal, defendant contends that the trial court erred by denying his motion to dismiss. We disagree and affirm the judgment.

### LEGAL BACKGROUND

Under the MDO Act, "[a]s a condition of parole, a prisoner may be designated and civilly committed as an MDO for involuntary treatment of a 'severe mental disorder' if certain conditions are met." (*People v. Allen* (2007) 42 Cal.4th 91, 99, fn. omitted (*Allen*).) Once an initial MDO commitment is established, before that period expires, "the district attorney may petition to extend that commitment by one year." (*Ibid.*) If it is extended, "the district attorney may file subsequent petitions to [further] extend the MDO's commitment in one-year increments." (*Id.* at p. 100.)

To set in motion a petition to extend an MDO's commitment by one year, "the medical director of the state hospital, the community program director, or the Director of Corrections first 'shall submit' to the district attorney a written evaluation of the prisoner '[n]ot later than 180 days' before the prisoner's termination of parole or release, 'unless good cause is shown' for delay. [Citation.] If the district attorney files a petition for continued involuntary treatment for one year [citation], the trial court will hold a hearing on the petition, and the trial 'shall commence no later than 30 calendar days' before the time the prisoner would have been released, 'unless the time is waived by the person or unless good cause is shown.' (§ 2972, subd. (a).)" (*Allen, supra*, 42 Cal.4th at p. 99.) The trial court shall advise the MDO of the right to a jury trial and the trial shall be by jury unless "waived by both the person and the district attorney." (§ 2972, subd. (a).)

## DISCUSSION

As we have mentioned, defendant's commitment was set to expire on August 7, 2008 and ASH initiated the recommitment proceeding on February 14.

Defendant points out that ASH should have initiated the recommitment proceeding before February 7, 2008, in order to comply with the 180-day period. He concludes that the trial court's denial of his motion to dismiss transgressed the MDO statute and his due process rights.

In *People v. Fernandez* (1999) 70 Cal.App.4th 117 (*Fernandez*), the district attorney filed a petition pursuant to section 2970 to extend the defendant's commitment for one year. The defendant filed a motion to dismiss the petition because (1) the medical director's letter requesting the extended commitment was not issued 180 days before the defendant's parole termination date, and (2) the trial on the petition was not commenced 30 days before the defendant's parole termination date.

Because good cause was not shown for the 180-day violation, the issue was whether the deadline was mandatory (jurisdictional) or directory. In denying the motion, the trial court found that the provision was directory. We agreed: "The fundamental purpose of the MDO provisions is thus to protect the public from dangerous mentally disordered prisoners. This purpose would not be furthered by a rule that the court absolutely loses jurisdiction when the 180-day rule of section 2970 is violated. In the context of this statute, we believe the purpose of the 180-day rule is to provide reasonable assurance that recommitment (if appropriate) may be addressed before a prisoner's scheduled release, so that those mentally disordered prisoners who still pose a danger to others will not be released from custody." (*Fernandez, supra*, 70 Cal.App.4th at p. 129.)

Since the provision was directory, the courts considered the due process issue, i.e., whether the defendant was harmed by the delay. (*Fernandez, supra*, 70 Cal.App.4th at p. 131.) In agreeing with the trial court's conclusion that the defendant suffered no due process deprivation, we applied this test: "In conducting such an analysis under section

2970 and similar statutes, courts have adopted the due process test used under both federal and state speedy trial decisions, which involves a balancing of any prejudicial effect of the delay against the justification for the delay. [Citations.] Except where there has been an extended delay, prejudice will not be presumed, and it will be incumbent upon the defendant to demonstrate actual prejudice. [Citations.] If the defendant fails to demonstrate prejudice, the court need not consider the reasons for the delay.” (*Ibid.*)

Here, the delay is de minimis--eight days at the most. And defendant did not and does not demonstrate prejudice from the delay.

Defendant “recognizes that [his] interpretation of the law is inconsistent with [*Fernandez*].” He merely disagrees with the reasoning of *Fernandez* and poses that the Supreme Court may or may not uphold *Fernandez* by implication when it decides a case pending before it. We agree with the reasoning and conclusion of *Fernandez*. Defendant’s contention therefore fails.

#### DISPOSITION

The judgment is affirmed.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.